IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 809 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAZIR UMAR JETHA

Versus

STATE OF GUJARAT

Appearance:

THROUGH JAIL for Petitioner No. 1

MR HL JANI, Ld. APP for Respondent

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/07/2001

ORAL JUDGEMENT

1. The present petition has been filed by the petitioner through jail because he was detained at District Jail, Surat in pursuant to the order dated 5/4/2000 passed in Externment Case No.5 of 1999 by the Sub-Divisional Magistrate, Junagadh dated 5/4/2000 under Section 62 of the Bombay Police Act,1951. However, the present petitioner has also challenged the externment order dated 19/10/1999, but no papers have been placed on record by him and even the State Government has also not placed on record the same and, therefore, in absence of such papers, it is very difficult to decide legality and validity of externment order dated 19/10/1999 and, therefore, at present I am considering the orders passed by the Sub-Divisional Magistrate, Junagadh dated 5/4/2000 whereby the petitioner has been detained in custody at District Jail, Surat upto 18/10/2001. I am keeping open the rights of the petitioner to file separate petition for challenging the order of externment dated 19/10/1999. Therefore, without observing anything on merits in respect to the externment order dated 19/10/1999, at present I am considering only the order in question passed by Sub-Divisional Magistrate, Junagadh under Section 62 of the Bombay Police Act, 1951 dated 5/4/2000.

2. Mr.H.L.Jani, learned APP appearing on behalf of the respondent - State has submitted that the present petition has been forwarded by the petitioner through District Jail, Surat and has submitted that because he has committed violence, the externment order dated 19/10/1999 in Externment Case No.5 of 1999 was passed whereby he was removed from the Junagadh, Porbandar, Amreli, Rajkot City and Rajkot Rural Districts for a period of two years. Meanwhile, certain offences have been registered against the present petitioner in Junagadh City on 26/11/1999, 4/4/2000 and 28/11/1999 and, therefore, considering these facts, the Sub-Divisional Magistrate, Junagadh has initiated the proceedings against the petitioner under Section 62 of the Bombay Police Act and came to the conclusion that after the order of externment he disobeyed three times the order of externment and without obtaining prior permission of the Competent Authority, he entered the area which has been prohibited by externment order and, therefore, the Sub-Divisional Magistrate, Junagadh has exercised powers under Section 62 of the Bombay Police Act, 1951.

3. In light of these facts, it is necessary to note the relevant provisions, which give power to Sub-Divisional Magistrate, Junagadh. Section 62 provides that if a person to whom a direction has been issued under Sections 55, 56 or 57 to remove himself from an

area, fails to remove himself, as directed, or having so removed himself, except with the permission in writing of the authority making the order [as provided in Sub-Section (2)], enters the area within the period specified in the order, the authority concerned may cause him to be arrested and removed in Police Custody to such place outside the area, as the said authority may in each case prescribe. In view of the above provisions, the power has been exercised by the Sub-Divisional Magistrate, Junagadh. Bare reading of these provisions will make it clear that it does not give power to the authority to put externee or detain the externee in the custody of the Jail Authority till the period of externment order is over. The authority has only power to arrest and remove in police custody the externee to such place outside the area, as the said authority may in each case prescribe. Therefore, the date 5/4/2000 order which has been passed in the present petition by the Sub-Divisional Magistrate, Junagadh is contrary to the provision of Sub-clause (1) of Section 62, because Sub-Divisional Magistrate, Junagadh has no power to detain the present petitioner in custody with the Jail Authority upto the completion of the period of externment order. Section 62 is not giving such power to any authority. In case any condition of externment order has been violated by externee, then the concerned authority can not detain such externee in Jail Custody upto the completion of remaining period of externment order. Therefore, the order which is passed by the Sub-Divisional Magistrate, Junagadh against the present petitioner is without jurisdiction. There is another provision under the Bombay Police Act, 1951, i.e. Section 142 which prescribes penalty for entering, without permission, the area from which a person is directed to be removed himself. This section provides for penalty for entering, without permission, the area from which a person is directed to be removed himself.

4. This Court in the case of RAMESHJI PANCHAJI THAKOR v. STATE OF GUJARAT & ORS., reported in 2001 (1) GLR, 171 has decided very identical question which has been raised in the present petition to the effect that where a man is externed from a certain area for a certain period, and if during that period the man enters that area, he can be arrested and removed from the area, and he may be prosecuted under Section 142, but he cannot without trial be placed in custody for the balance of the period of externment. The relevant observation made by this Court in para-(6) which are as under :-

"6.1 Likewise, such interpretation of Sec.62(2) of the Bombay Police Act would render

provision of Sec.167 of Criminal Procedure Code nugatory.

6.2 Sending a man to prison for a period of two years, without trial, as has been done is more harsh than provisions for preventive detention, where law provides detention upto six months, one year or two years as the case may be. There also, checks and guards are provided by law to protect the liberty of detenu against possible misuse. The law makers could not be taken to have intended such interpretation while incorporating Section 62(2) of the Bombay Police Act.

6.3 The interpretation adopted while passing the impugned order is against the basic principles of natural justice and criminal jurisprudence. The order could not have been passed without affording opportunity to the externee of being heard. A plain reading of the impugned order indicates clear breach of this canon of criminal jurisprudence.

6.4 It is also brought to the notice of the Court that an offence is registered against the petitioner under Sec.142 of the Bombay Police Act for breach of the externment order. Thus, for the act of breach of externment order, proceedings are initiated. The petitioner would be dealt with in accordance with law and will be punished therefore if found guilty. As such, the impugned order of putting the petitioner in jail for two years can be said to be an order of punishment without adjudication, and therefore, it requires to be quashed by allowing this petition.

6.5 One more adverse effect of the impugned order, if sustained, would be that the petitioner would be punished twice, for the same act of committing breach of externment order, if ultimately he is convicted in proceedings under Sec.142 of the Bombay Police Act. This also cannot be permitted to happen."

5. For the reasons stated above, the impugned order directing the externee to be kept in District Jail, Surat upto 18/10/2001 by order dated 5/4/2000 is without authority and jurisdiction.

6. For the reasons stated above, the present petition is allowed. The impugned order dated 5/4/2000 passed in Externment Case No.5 of 1999 by the Sub-Divisional Magistrate, Junagadh in exercising power under Sub-Clause (1) of Section 162 of the Bombay Police Act, 1951 is hereby quashed and set aside. The petitioner - Nazir Umar Jetha who has been detained in custody at District Jail, Surat is ordered to be released immediately, if not required in any other matter. Rule is made absolute. Direct service is permitted.

(H. K. RATHOD,J.)

(vrpanchal)**